## APPENDIX A

Filed Nov. 23, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 15,961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 16,031

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

KOHLER COMPANY, *Respondent.*

Before: Prettyman, Fahy and Burger, Circuit Judges, in Chambers.

**Order**

Upon consideration of the motion of Kohler Company to transfer the proceedings of these cases to the United States Court of Appeals for the Seventh Circuit, of the opposition, of the reply to the opposition and of the statement filed by the National Labor Relations Board, it is

ORDERED by the court that the motion to transfer is denied.

*Per Curiam.*

Dated: November 23, 1960

Filed Jan. 9, 1961

Before: Wilbur K. Miller, Chief Judge, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

**Order**

Upon consideration of the motion of the Kohler Company for rehearing en banc on its motion to transfer these proceedings to the United States Court of Appeals for the Seventh Circuit and of the request for oral argument and of the opposition thereto, it is

ORDERED by the court that the motion for rehearing en banc and request for oral argument are denied.

*Per Curiam.*

Dated: January 9, 1961

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Filed Aug. 26, 1960—10:35 a.m.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

**Petition for Review of an Order of the National Labor Relations Board**

Pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 141, *et seq.*), petitioner named in the caption, petitions this Court to review and modify or partially set aside the Decision and Order of the National Labor Relations Board entered on August 26, 1960 in a proceeding identified upon the rec-

ords of the Board as Case No. 13-CA-1780, in which the charging party is petitioner herein.

1. Upon due proceedings had before the Board in said matter, a trial examiner issued his Intermediate Report on the 9th day of October, 1957, in which he made findings of fact and conclusions of law finding that the Kohler Co., the party charged, had engaged in unfair labor practices, and issued recommendations based thereon. After certain further proceedings the trial examiner, on March 5, 1959, issued a Supplemental Intermediate Report renewing the recommendations made in the Intermediate Report. Thereafter, upon exceptions filed by both parties with the National Labor Relations Board, on August 26, 1960, the Board issued its Decision and Order in the aforesaid proceedings, sustaining certain of the Kohler Co.'s exceptions and overruling certain of petitioner's exceptions. Petitioner seeks review and modification of the Board's Decision and Order.

2. Venue is based upon that part of Section 10(f) of the National Labor Relations Act, as amended, which provides that:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside."

Petitioner, the charging party in the proceedings before the National Labor Relations Board, is a person aggrieved by the Board's Order.

3. *The action of the Board is not supported by substantial evidence on the record or by applicable law and is arbitrary and capricious and an abuse of discretion.*

WHEREFORE, Petitioner prays that the Court modify or partially set aside the Board's Decision and Order and grant such other and further relief as may be just and proper.

Respectfully submitted,

JOSEPH L. RAUH, JR.
Joseph L. Rauh, Jr.

JOHN SILARD
John Silard
1631 K Street, N. W.
Washington 6, D. C.

---

Filed Oct. 13, 1960

No. 15,961

**Answer of the National Labor Relations Board to Petition to Review an Order of the Board**

The National Labor Relations Board files the following answer to the Petition to Review filed in this proceeding:

1. The Board admits the allegations of paragraphs 1 and 2.

2. The Board denies the allegations of paragraph 3.

3. The Board will file with the Court a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record in the proceeding, as provided in Rule 38(g) of this Court.

WHEREFORE, the Board prays that this Court cause notice of the filing of this Answer to be served on the petitioner

and that this Court enter a decree denying the Petition to Review.

MARCEL MAILLET-PREVOST
Marcel Mallet-Prevost
*Assistant General Counsel*
*National Labor Relations Board*

Dated at Washington, D. C.,
this 12th day of October, 1960.

---

Filed Oct. 13, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,031

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

KOHLER CO., *Respondent*.

**Petition for Enforcement of an Order of the National Labor Relations Board**

*To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:*

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*, as amended by 73 Stat. 519), respectfully petitions this Court for the enforcement of its order against Respondent, Kohler Co., Kohler, Wisconsin, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as Case No. 13-CA-1780.

In support of this petition the Board respectfully shows:

1. Upon proceedings had before the Board in said matter, the Board on August 26, 1960, duly stated its findings of

fact and conclusions of law, and issued an order directed to the Respondent herein, its officers, agents, successors and assigns. The Board Decision and Order was served by personal service on respondent's counsel on the same date.

2. On August 26, 1960 pursuant to Section 10(f) of the Act, *Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America*, the charging party in the Board proceeding, filed with this Court a petition to review the Board's Decision and Order. Said petition appears on the docket of the Court as No. 15,961, *Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America*. The Board has filed an Answer to said petition.

3. Also on August 26, 1960, but 35 minutes after the petition in No. 15,961 was filed in this Court, pursuant to Section 10(f) of the Act, Respondent filed with the Court of Appeals for the Seventh Circuit a petition to review the Board's Decision and Order. Said petition appears on the docket of that court as No. 13,120, *Kohler Co.* v. *N.L.R.B.* The Board filed an answer to said petition advising the court that a previous petition to review had been filed with this Court, that the Board was required by statute to file the certified record in this case with this Court, and that the Board reserved further answer.

4. Concurrently herewith, in accordance with the Union's petition for review and pursuant to Rule 38(g) of this Court and 28 U.S.C. Sec. 2112(a) (72 Stat. 941) the Board is filing a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board upon which the said order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board. Said list is filed with this Court as the court in which the first petition for review was filed.

The same certified list also constitutes the certified record in the instant proceeding.

5. Although Respondent is a Wisconsin corporation engaged in business in the State of Wisconsin, this Court has jurisdiction of this petition for enforcement by virtue of its jurisdiction over the entire proceeding upon the filing of the certified list in connection with the petition to review in No. 15,961. *International Ladies Garment Workers' Union v. N.L.R.B.*, 96 App. D.C. 272, 225 F. 2d 923.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition to be served upon Respondent, and that this Court take jurisdiction of the proceedings and of all questions determined therein, and make and enter upon the pleadings, the testimony and evidence, and the proceeding set forth in the transcript, and upon the order made thereupon, a decree enforcing the Board's order and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
*Assistant General Counsel*
*National Labor Relations Board*

Dated at Washington, D. C.,
this 12th day of October, 1960.

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington 25, D. C.

October 12, 1960

Joseph W. Stewart, Esquire
Clerk, United States Court of Appeals
for the District of Columbia Circuit
3rd & Constitution Avenue, N. W.
Washington 25, D. C.

Re: No. 15,961—*Local 833, UAW-AFL-CIO, Int'l Union, United Automobile, Aircraft, & Agricultural Implement Workers of America* v. *N.L.R.B.*
*N.L.R.B.* v. *Kohler Co.*

Dear Mr. Stewart:

I am enclosing eight mimeographed copies each of the Board's answer to petition to review in Case No. 15,961, and of the petition for enforcement in *N.L.R.B.* v. *Kohler Co.*, and six mimeographed copies of the certified list of the National Labor Relations Board in these cases and of the index to that list.

Both the captioned cases arise out of a single order of the Board issued on August 26, 1960. On the same date two petitions were instituted to review the Board's order: (1) by the charging Union in this Court, and (2) by the Company in the Court of Appeals for the Seventh Circuit. The Company's petition for review was filed at 10:00 a.m. Central Daylight Saving Time and the Union's petition was filed at 10:35 a.m. Eastern Daylight Saving Time. While it is not free from doubt, the Board has determined that the petition filed in this Court was the one which was first filed within the meaning of Section 2112(a) of 28 U.S.C. Accordingly, we are filing the certified list in this Court, and we have filed a motion in the Seventh Circuit asking.

that court, pursuant to Section 2112(a), to transfer the proceedings before it to this Court.

Copies of this letter and attached documents are also being sent to the Regional Office in which the case arose. Although this matter is now being handled directly through the Washington Office, we shall appreciate your keeping the Regional Director, whose name and address is listed on the attached sheet, advised of the progress of this case by furnishing him with copies of all correspondence addressed to me or opposing counsel.

In accordance with Section 10(e) of the National Labor Relations Act, as amended, will you kindly notify the persons listed on the attached sheet of the filing of the certified list with index, answer, and petition. Certificate of service is also enclosed.

Very truly yours,

STUART ROTHMAN
*General Counsel*

By MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
*Assistant General Counsel*

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**Excerpts from General Docket**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15961

LOCAL 833, UAW v. N.L.R.B.

| Date | Filings—Proceedings | Filed |
|---|---|---|
| 8-26-60 | Petition for review of order of the National Labor Relations Board | |

10-13-60 Respondent's answer to petition for review "

10-21-60 Motion of respondent in No. 16,031 to transfer to Seventh Circuit "

11- 4-60 Opposition of petitioner to motion of Kohler Co. to transfer proceedings "

11-18-60 Reply of Kohler Company to objection to motion to transfer proceedings "

11-23-60 Per Curiam order consolidating this case and No. 16,031; and allowing Kohler Company to intervene in this case "

11-23-60 Per Curiam order denying motion of Kohler Company to transfer the proceedings to the U. S. Court of Appeals for the 7th Circuit "

11-23-60 Memorandum of N.L.R.B. "

12- 7-60 Intervenor's motion to reconsider motion to transfer proceedings to 7th Circuit "

12-13-60 Petitioner's objection to motion to reconsider motion to transfer proceedings "

1- 9-61 Per Curiam order denying motion for rehearing en banc and request for oral argument "

Filed August 26, 1960

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13,120

KOHLER CO., a Wisconsin Corporation, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

**Petition for Review of Order of the National Labor Relations Board**

*To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:*

Kohler Co., a Wisconsin corporation respectfully represents:

1. Petitioner is, and at all times mentioned herein was, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and having its principal office, manufacturing plant, and place of business in the Village of Kohler, in said State of Wisconsin.

2. The proceedings as to which review is sought resulted in a Decision and Order made by the National Labor Relations Board on February 6, 1957 (117 NLRB 321) in a proceeding entitled Kohler Co. and Local 833, UAW-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Case No. 13-CA-1780, by which said Decision and Order the National Labor Relations Board overruled an Opinion and Order of the Trial Examiner dated October 15, 1956, denied petitioner's motion to dismiss the complaint for lack of jurisdiction because the charging party was not in compliance with Section 9(h) of the National Labor Relations Act, as amended, and remanded the case to the Trial Examiner for the preparation of an Intermediate Report.

Said proceedings culminated in a Decision and Order made by the National Labor Relations Board on ..... 1959, in which the Board held that petitioner had violated Sections 8 (a) (1), 8 (a) (3) and 8 (a) (5) of the National Labor Relations Act, as amended, and ordered petitioner to cease and desist from sundry alleged practices, to make whole certain employees and to take certain affirmative actions as set forth in an appendix to said Decision and Order.

3. This Court has jurisdiction under Section 10 (f) of the National Labor Relations Act, as amended, the alleged unfair labor practices having been alleged to have been engaged in at Kohler, Wisconsin, and petitioner having its principal office, manufacturing plant and place of business and transacting business in Kohler, Wisconsin, within the Seventh Judicial Circuit.

4. Petitioner states that it is aggrieved by said Decisions and Orders and that said Decisions and Orders are unreasonable, capricious, arbitrary and contrary to law for the following reasons:

A. The Board was lacking in jurisdiction to issue any complaint, entertain any proceeding or to enter any Decision or Order or to afford any relief to the Charging Party for the reason that said Charging Party had not complied with the provisions of Section 9 (h) of the National Labor Relations Act, as amended.

B. The Board's Decision and Order is not supported by substantial evidence on the record considered as a whole.

C. The Board's Decision and Order will not effectuate the purposes of the Act.

D. The Board's Decision and Order is in contravention of the National Labor Relations Act, as amended, and the due process clause of the Constitution of the United States.

E. The Board erred in failing to find that petitioner had not engaged in any unfair labor practice under the National Labor Relations Act, as amended.

F. The Board erred in failing to find that, from May 4, 1954, and continuously thereafter, the Charging Party was not bargaining in good faith in that it was insisting, as a condition of settlement, on agreement on a subject outside of the scope of mandatory bargaining, i.e. agreement that all strikers should be reinstated regardless of unlawful conduct or misconduct.

G. The Board erred in failing to sustain each of petitioner's exceptions to the Trial Examiner's Intermediate Report and to the Supplemental Intermediate Report filed in the said proceeding.

H. The Board erred in failing to find that the Trial Examiner committed prejudicial error in his ruling at the original hearing and on the hearing on reopening in rejecting testimony and exhibits offered by petitioner and in unduly restricting petitioner's right of examination of adverse parties.

I. The Board erred in that its "Order Remanding Proceeding to Regional Director For Further Hearing", dated November 19, 1958, was unduly restrictive and therefore prejudicial to petitioner.

J. The Board erred in failing to find that the union had lost its majority status prior to February 10, 1955, and that such loss of majority status was not due to any unfair labor practice on the part of petitioner.

K. The Board erred in sustaining the Trial Examiner's rejection of petitioner's motion to dismiss the proceeding for abuse of process.

WHEREFORE, petitioner prays that said Decisions and Orders of the National Labor Relations Board be annulled and set aside, that the National Labor Relations Board be directed to dismiss its complaint against the petitioner, and

that petitioner have such other and further relief as may be just and proper.

Respectfully submitted,

LYMAN C. CONGER
EDWARD J. HAMMER
*Attorneys for Petitioner*

Kohler, Wisconsin

LYMAN C. CONGER
EDWARD J. HAMMER
c/o Kohler Co.,
Kohler, Wisconsin

*Of Counsel:*

WILLIAM F. HOWE,
Gall, Lane and Howe,
401 Commonwealth Building,
Washington 6, D. C.

ELLISON D. SMITH, JR.,
703 Barringer Building,
Columbia, S. C.

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Filed October 13, 1960

**Answer of the National Labor Relations Board to Petition for Review of an Order of the Board**

The National Labor Relations Board files the following answer to the Petition for Review filed in this proceeding.

1. The Board admits the allegations in Paragraphs 1, 2, and 3, but shows the Court that at the time the petition for review was filed in this Court, a petition for review of the same Decision and Order was on file in the Court of Appeals for the District of Columbia Circuit, being case No. 15,961.

2. (a) The Board shows that under 28 U.S.C. Sec. 2112 (a) (72 Stat. 941), it is required to file the record in this case with the court in which the proceeding with respect to its order was first instituted, in this instance the Court of Appeals for the District of Columbia Circuit, and that such record is to be filed on or before October 15, 1960.

(b) Further answering the Board shows that under the same statute the present proceeding before this Court is to be transferred to the Court of Appeals for the District of Columbia Circuit upon such filing of the record.

3. The Board respectfully reserves further response to the petition until the venue of the proceeding is settled.

WHEREFORE, the Board prays that this Court cause notice of the filing of this Answer to be served on petitioner.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
*Assistant General Counsel*
*National Labor Relations Board*

Dated at Washington, D. C.,
this 12th day of October, 1960.

**Order**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

January 18, 1961

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. WM. G. KNOCH, *Circuit Judge*

No. 13120

KOHLER CO. a Wisconsin Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Under date of August 26, 1960, at the hour of 10:10 A.M. Central Daylight Time, Kohler Co. filed its Petition for Review of an Order of the National Labor Relations Board. The Board on October 14, 1960, filed its answer to that Petition stating that at the time that the aforesaid Petition was filed in this Court, a Petition for Review of the same decision and order was on file in the Court of Appeals for the District of Columbia Circuit, which case was No. 15961, and that, under authority of Title 28, U.S.C., § 2112(a) (72 Stat. 941) the Board was required to file the record in this cause with the Court in which the proceedings with respect to its order were first instituted, in this instance, the Court of Appeals for the District of Columbia Circuit; and that under the same Statute, the present proceeding before this Court was to be transferred to the Court of Appeals for the District of Columbia Circuit upon such filing of the record. The Board therefore moved that this Court transfer the proceedings in this case to the Court of Appeals for the District of Columbia Circuit as required by the Statute. On October 21, 1960, Kohler Co. filed its

Opposition to the Motion of the National Labor Relations Board to Transfer Cause, in which it was indicated that Kohler Co. had filed a motion with the Court of Appeals for the District of Columbia Circuit to transfer the proceedings from that Court to this Court "[f]or the convenience of the parties in the interest of justice" in accordance with the provisions of the aforesaid Statute; to which the Board filed a reply inviting this Court's attention to the wording of the Statute which states:

> "The other courts in which such proceedings are pending *shall* thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court *may* thereafter transfer all the proceedings with respect to such order to any other court of appeals." [emphasis added]

On November 23, 1960, the Court of Appeals for the District of Columbia Circuit denied Kohler Co.'s motion to transfer all of the proceedings there pending to this Court. Under date of November 30, 1960, Kohler Co. filed a statement indicating that motion for reconsideration would be presented. On December 7, 1960, Kohler Co. filed a Petition for Rehearing En Banc with the Court of Appeals for the District of Columbia Circuit. On January 9, 1961, this petition was denied.

Accordingly, pursuant to Title 28, U.S.C., § 2112(a), this Court is herewith transferring this cause to the Court of Appeals for the District of Columbia Circuit.

A True Copy:

Teste:

KENNETH J. CARRICK
*Clerk of the United States Court of Appeals for the Seventh Circuit.*

Filed Oct. 3, 1960

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,759

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK and DISTILLERY WORKERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 15,929

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

GULF BOTTLERS, INC., *Respondent*.

Before: PRETTYMAN, *Chief Judge*, and EDGERTON, *Circuit Judge*, in Chambers.

### Order

Upon consideration of the motion of Gulf Bottlers, Inc., to transfer these cases to the United States Court of Appeals for the Fifth Circuit, of the opposition and of the reply, it is

ORDERED by the court that in so far as Gulf Bottlers, Inc., moves to transfer these cases the motion is denied and that in so far as Gulf Bottlers, Inc., moves to dismiss, said motion is denied without prejudice to a renewal at the hearing of these cases on the merits.

PER CURIAM.

Dated: October 3, 1960

## Excerpts from General Docket

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15929

N.L.R.B. v. Gulf Bottlers, Inc.

| Date | Filings—Proceedings | Filed |
|---|---|---|
| 8-26-60 | Respondent's motion to dismiss, or in the alternative to transfer to Court of Appeals for the Fifth Circuit | " |
| 9-14-60 | Opposition of petitioner in case No. 15,759 to motions of Gulf Bottlers, Inc. | " |
| 9-23-60 | Petitioner's answer to Gulf Bottlers' opposition to motion to dismiss | " |
| 10- 3-60 | Per Curiam order denying motion of Gulf Bottlers, Inc. to transfer this case and No. 15,759 to the U. S. Court of Appeals for the 5th Circuit; and denying motion of Gulf Bottlers, Inc. to dismiss without prejudice to a renewal at the hearing on the merits | " |
| 10- 6-60 | Petition of Gulf Bottlers, Inc., for rehearing and for rehearing en banc | " |
| 12- 8-60 | Per Curiam order denying petition of Gulf Bottlers, Inc., for rehearing en banc | Filed |
| 12- 8-60 | Per Curiam order denying petition of Gulf Bottlers, Inc., for rehearing by the original division of the court | |

Filed Sep 16 1960

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,849 September Term, 1960

LOCAL 2674, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 15,885

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BUTCHER BOY REFRIGERATOR DOOR COMPANY, *Respondent*.

Before: WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges*, in Chambers.

### Order

Upon consideration of the motion of Butcher Boy Refrigerator Door Company for leave to intervene in case No. 15,849, of the motion of Butcher Boy Refrigerator Door Company to transfer these cases to the United States Court of Appeals for the Seventh Circuit, of the opposition to the motion to transfer, of the answer to the motion to transfer filed by the Board, and of the motion of the Board for leave to file a single certified list of the record in these cases, it is

ORDERED by the court that Butcher Boy Refrigerator Door Company is allowed to intervene in case No. 15,849, that the motion to transfer these cases to the United States Court of Appeals for the Seventh Circuit is granted and that the Clerk is directed to transmit to the United States

Court of Appeals for the Seventh Circuit the original copies of all documents filed in these cases.

It is FURTHER ORDERED by the court that the motion of the National Labor Relations Board for leave to file a single certified list of the record in these cases is dismissed as moot.

PER CURIAM.

Dated: September 16, 1960

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**Excerpts from General Docket**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,885

NATIONAL LABOR RELATIONS BOARD

v.

BUTCHER BOY REFRIGERATOR DOOR COMPANY

| Date | Filings & Proceedings |
|---|---|
| 7-27-60 | Motion of Butcher Boy Refrigerator Door Co. to transfer proceedings. |
| . . . . . | |
| 8- 4-60 | Opposition of Petitioner in No. 15,849 to Motion of Intervenor Butcher Boy Refrigerator Door Co., to transfer proceedings. |
| . . . . . | |

FILE COPY

No. 707

FILED
MAR 8 1961
JAMES R. BROWNING, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

KOHLER CO.,

*Petitioner,*

*v.*

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

*and*

NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

JOSEPH L. RAUH, JR.,
JOHN SILARD,
*1631 K Street, N. W.,*
*Washington 6, D. C.,*
*Attorneys for Respondent*
*Local 833, UAW-AFL-CIO*

*Of Counsel:*

HAROLD A. CRANEFIELD,
*General Counsel, UAW-AFL-CIO,*
*8000 East Jefferson Avenue,*
*Detroit 14, Michigan.*

LOUIS H. POLLAK,
*127 Wall Street,*
*New Haven, Connecticut.*

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

---

**No. 707**

---

KOHLER CO.,

*Petitioner,*

*v.*

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

*and*

NATIONAL LABOR RELATIONS BOARD,

*Respondents*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

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### Counter-Statement of the Case

In perusing the Kohler Company's petition for certiorari the Court may well wonder why the Company is going to such unprecedented lengths to transfer these review and enforcement proceedings out of the District of Columbia Circuit into the Seventh Circuit when nothing in the Company's petition discloses any real benefit or convenience

to the Company from such a transfer. The undisclosed reason for the Company's repeated efforts to transfer to the Seventh Circuit (first before the Labor Board, then twice before the District of Columbia Circuit and now finally by an attempt to obtain interlocutory review here) is the Company's determination to gain the *stare decisis* benefit of *Goodman Mfg. Company* v. *NLRB*, 234 F. 2d 775 (C.A. 7, 1956). In *Goodman* the Seventh Circuit held that Labor Board proceedings can not be instituted on behalf of a union unless its trustees filed non-Communist affidavits under Section 9(h) of the Taft-Hartley Act.[1] Since the UAW trustees had not filed 9(h) affidavits, the *Goodman* ruling was squarely before (and expressly rejected by) the Labor Board in the instant case.[2] The sequence of events below will reveal most clearly that it is only to obtain the benefit of the *Goodman* ruling that the Company seeks a reversal here of the District of Columbia Circuit's unanimous refusal to transfer proceedings to the Seventh Circuit:

1. After decades of Kohler Company anti-union activity and a history of company unions, in 1952 the United Automobile Workers was chosen as bargaining agent by the employees of Kohler and entered into contractual relations with the Company. In April 1954, after futile efforts to reach agreement on a new contract, there was commenced at Kohler what became the longest major strike in the history of the nation. On October 26, 1954, the Board's General Counsel issued a complaint against the Kohler

[1] The Seventh Circuit so held in *Goodman* even though the union trustees were not denominated "officers" in the union's constitution. Cf. *N.L.R.B.* v. *Coca-Cola Bottling Co.*, 350 U.S. 264 and *Ekco Products Co.*, 117 N.L.R.B. 137, wherein this Court and the Labor Board expressly adopted the constitutional test of officership which the Seventh Circuit rejected in *Goodman*.

[2] 117 N.L.R.B. 321; 128 N.L.R.B. No. 122.

Company which, as subsequently amended, charged the Company with long continued refusal to bargain in good faith with the Union, a refusal causing and prolonging the strike. After lengthy proceedings, the Board ruled in substance:

(a) *against the Company:*

(i) that the Company has refused to bargain with the Union in good faith from and after the third month of the strike, and

(ii) that the Company must, therefore, bargain in good faith and, upon application, reinstate some 1600 Kohler strikers.

(b) *against the Union:*

(i) that the strike did not result from the Company's refusals to bargain, although it was long protracted thereby, and

(ii) that some 77 strikers (comprising the entire leadership of the local union, including all of its officers, Executive Board, and Strike Committee) were validly discharged and are not entitled to reinstatement.

2. In the Board proceedings, the Company challenged the jurisdiction of the Board on the ground that the Union's trustees had failed to file non-Communist affidavits under Section 9(h) of the Taft-Hartley Act (a section recently repealed by the Congress). In urging that UAW trustees are "officers" of the Union required to file 9(h) affidavits, the Company relied upon the Seventh Circuit's 1956 *Goodman* decision, the only case which adjudicates the trustee question. The Trial Examiner accepted the Company's view and dismissed the proceedings, relying on *Goodman*. On appeal, a unanimous

Labor Board reversed the Trial Examiner and reinstated the proceedings, rejecting the Seventh Circuit's *Goodman* ruling that trustees are "officers" of a union though not so denominated in the union's constitution. 117 N.L.R.B. 321. The Board in its final Decision and Order has unanimously reaffirmed its ruling rejecting *Goodman*.

3. On August 24, 1960, it was announced that the Board would release its decision in its Executive Secretary's office in Washington at 10:30 a.m. on August 26th. The Union anticipated (correctly, as events proved) that if the Trial Examiner's findings against the Company were affirmed in any substantial respect, the Company would thereupon rush into the Seventh Circuit with a petition for review so as to gain the benefit of the *Goodman* ruling. On the morning of the release of the Board's decision the Union had ready for filing at the office of the Clerk of the Court of Appeals for the District of Columbia Circuit alternative petitions for review, responsive to the varying possible Board decisions. After receiving and viewing the Board's Decision and Order at 10:30 a.m., the Union immediately (10:35 a.m.) filed the appropriate petition for review with the Court of Appeals for the District of Columbia Circuit. The Company, which had likewise prepared alternative petitions in advance, filed its Seventh Circuit petition in Chicago thirty-five minutes later, some forty minutes after the release of the Board's decision in Washington.[3] The Company's first tendered ground for reversal in that Seventh Circuit petition was that "the Board was lacking

[3] In its petition for certiorari, the Company refers invidiously to the fact that the Union "outsped" the employer "in a race to the courthouse" (p. 9). But the Company, like the Union, was engaged in a race of diligence—the Company to obtain review by the *Goodman* circuit, the Union to obtain review in an uncommitted circuit. Having entered the race, the Company ought not be heard to deprecate the significance of its outcome or to complain that it was bested in diligence by the Union.

in jurisdiction . . . for the reason that said Charging Party had not complied with the provisions of Section 9(h) of the National Labor Relations Act . . ."

4. Thereafter, in its continuing effort to gain the benefit of *stare decisis* in the *Goodman* circuit, the Company filed applications before the Labor Board against the filing of the record in the Court of Appeals for the District of Columbia Circuit. The Board, however, adhering to the clear statutory standard of "first instituted" under 28 U.S.C. 2112(a), filed the record in that Circuit and instituted appropriate enforcement proceedings in that Court.

5. Thereafter, the Company intervened in the Court of Appeals below and moved for transfer to the Seventh Circuit under 28 U.S.C. 2112(a) on *forum non conveniens* grounds. The motion was opposed by the union, Local 833, UAW-AFL-CIO; the National Labor Relations Board took no position on the motion.[4] The Court of Appeals unanimously denied the Company's motion by an order of November 23, 1960 (per Judges Prettyman, Fahy and Burger). The Company's application for rehearing en banc was likewise unanimously rejected by an order of the full Court of Appeals on January 9, 1961. Subsequently, pursuant to 28 U.S.C. 2112(a), the Company's review petition filed in the Seventh Circuit has, on motion of the National Labor Relations Board, been transferred to the District of Columbia Circuit.

[4] The Board did, however, advise the Clerk of the Circuit Court by letter of October 12, 1960, regarding the *Kohler* case that "this matter is now being handled directly through the Washington office" and the Company in its petition here (at p. 11) concedes that "the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders" resides and practices in the District of Columbia.

## Argument

In this case interlocutory review is sought by certiorari under 28 U.S.C. 1254(1) over the refusal by the court below to effect a *forum non conveniens* transfer to the Seventh Circuit. But in its petition before judgment below the Company nowhere purports to meet nor does it even cite Rule 20 of this Court, which requires "a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Far from making a showing of "imperative public importance," no grounds whatever are presented to warrant the interlocutory grant of certiorari sought by the Company; indeed, the court below could have reached no other result than to have denied the Company's request for transfer.

(a) *The Court Below Has Properly Resolved the* Forum Non Conveniens *Question in Accordance with Applicable Law*

The statute under which the Company seeks a transfer, 28 U.S.C. 2112(a), codifies familiar *forum non conveniens* law—transfer must be predicated upon "the convenience of the parties in the interest of justice." The same terms under 28 U.S.C. § 1404(a), providing for district court transfers, have received considerable judicial gloss. Among the familiar principles in their construction, derived from the original equity doctrine, is the rule that it is the burden of the party moving for transfer to make a persuasive showing of convenience before a court will disturb the plaintiff's choice of forum.

As stated in this Court's decision in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508:

> "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The generally accepted construction of the *Gulf Oil* test is that by Judge Frank in *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (C.A. 2, 1950):

> "Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties.'"

The Company failed to meet its "burden of making out a strong case" for transfer. Indeed, neither below nor here has the Company suggested any "inconvenience" factor which would warrant such a transfer. On the contrary, the Company concedes (p. 11) that as concerns the District of Columbia "*principal appellate counsel for the Union reside and practice here, as do associated counsel for the Company and the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders.*" With counsel for all three parties located in the District of Columbia and *no* counsel for any of the parties residing in Chicago where the Seventh Circuit review would take place, it is clear that the convenience of all those involved in these appellate proceedings—the counsel for the parties—is *entirely* in favor of retention of review in the District of Columbia.[5]

[5] The Company suggests that its *principal* counsel resides in the Seventh Circuit (actually at Kohler, Wisconsin). But with principal counsel for the other two parties admittedly residing in the District of Columbia as well as associated counsel for the Company, the mere fact that the

In an attempt to avoid the "convenience of the parties" standard of the statute here involved, the Company suggests that certain "contacts with the case lie in the Seventh Circuit" (p. 11). Specifically, the Company asserts that the Union and the Company "reside" in that Circuit, as do the employees of the company involved in these unfair labor proceedings, and that the unfair labor practices occurred in that jurisdiction. But the "residence" of the parties, or of Kohler workers, has no bearing whatever upon the appellate proceedings here involved; indeed, the Company does not even attempt to show that these "contacts" affect the convenience of the parties in any way in these appellate proceedings.

The Company also asserts that in this case compliance with the Board's order must "be supervised" in the Seventh Circuit (p. 11). Unless the Company is suggesting that it may not comply with a judicial enforcement order, which it expressly denies (p. 11, n. 4), judicial supervision will hardly be necessary and, if defiance there should be, there would be no element of convenience in having such judicial supervision in Chicago, where no counsel resides, as against the District of Columbia where counsel are located. At any rate, Congress has provided that the District of Columbia is an appropriate alternative forum at the option of an aggrieved party to challenge Labor Board orders, *irrespective* of the non-residence of the parties and the situs elsewhere of "compliance" with the order involved;[8] accordingly, non-residence and "com-

Company's "principal" counsel resides in Wisconsin could not possibly require the transfer of these proceedings to Chicago under traditional *forum non conveniens* consideration.

[8] 29 U.S.C. § 160(f):

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit

pliance" elsewhere can hardly be deemed to render the District of Columbia an improper forum for review. In a word, not a single consideration is suggested by the Company which would have supported a finding by the court below that the convenience of the parties in this appellate litigation would be better served by its transfer away from the circuit where the private and Government counsel who will handle these proceedings practice and reside. Far from abusing its discretion in refusing transfer under these circumstances, any other course by the court below would have run counter to basic principles of *forum non conveniens*.

Finally, an additional persuasive reason against transfer inheres in the Company's attempted use of *forum non conveniens* to obtain the benefit of *stare decisis* in the Seventh Circuit on a substantive issue dispositive of the proceedings. Understandably, the Company would prefer review in the court where *Goodman* may control the Section 9(h) issue involved in this case and result in a technical dismissal of the Labor Board's order against the Company. But courts have uniformly refused to use *forum non conveniens* to assist a party "seeking a forum offering particular advantages to himself," especially the advantage of substantive law. See *Convenient Forum v. Friendly Forum*, 10 Stan. L. Rev. 367, 368, 369, n. 10, and cases there cited.[7] Accordingly, all apart from the "convenience

wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, *or in the United States Court of Appeals for the District of Columbia* • • •" (emphasis supplied).

[7] Not only have courts refused to transfer to assist a defendant "shopping" for substantive law, but solicitude for plaintiff's choice of forum has even led courts to assure, before a removal is granted, that the plaintiff would not thereby be subjected to a loss in substantive rights. Thus, where removal is ordered, courts have held the law of the first forum to accompany the action to the second, in order to protect the plaintiff's

of the parties," upon which the Court of Appeals below correctly ruled and on which no significant question for review is presented, the Company cannot successfully attack the refusal of the court below to give it the benefit of review in the *Goodman* circuit on the pretext of *forum non conveniens*.

(b) *The Court Below Did Not Indulge in a "Probably Erroneous" Construction of 28 U.S.C. § 2112(a), and No Conflict Is Presented in That Court's Disposition of Transfer Motions under the Statute*

In addition to challenging the refusal of the court below to apply *forum non conveniens* in its favor, the Company seeks review of what it calls a "probably erroneous" construction of the transfer statute by the court below, and because of what it asserts is a "conflict" within that court in its disposition of transfer motions in similar cases. Neither ground has substance.

i. The Company makes the entirely gratuitous suggestion that the court below "may have considered that transfer should be denied because Congress intended that persons aggrieved by NLRB orders should have a right of review in the District of Columbia Circuit irrespective of the convenience of the parties and the interests of justice" (p. 10). But there is no basis for this straw man which the Company seeks to create. The court below never suggested any such basis for its decision; indeed, the Union never even made such an argument to the court

rights. The principle is applicable both in removal from state courts and in federal venue transfers. *See Headrick v. Atchison, Topeka and Santa Fe Ry. Co.*, 182 F. 2d 305, 309-310 (C.A. 10, 1950) and cases there cited; *Frechoux v. Lakes Brs. S.S. Co.*, 118 F. Supp. 231 (S.D.N.Y., 1953); *May v. The Steel Navigator*, 152 F. Supp. 254 (S.D.N.Y., 1957); *Greeley v. Gibraltar Enterprises*, 87 F. Supp. 419, 414 (D.C.N.M., 1949).

below.[8] What the Union did argue to the court below[9]—and what it contends here—is that there are strong reasons of policy for review in the District of Columbia, reasons recognized by Congress in a great number of statutes granting review in the District of Columbia irrespective of the non-residence of the parties. But it was never suggested that these reasons *preclude* transfer out of the District of Columbia and we agree with the Company's view that "there is no warrant for carving from the operation of the provision [28 U.S.C. § 2112(a)] an exception for the District of Columbia Circuit." Thus the supposed "construction" which the Company would bring here for interlocutory review was neither urged upon, nor adopted by, the court below.

ii. Nor is there any substance to the contention (p. 15) that there is "conflict" in the disposition by the court below of motions to transfer in similar cases. While the Company urges that in the earlier *Butcher Boy* case, unlike the instant case, there was a transfer to the Seventh Circuit of a petition for review filed by a union in the District of Columbia Circuit, the fact that *forum non conveniens* is applied in one Labor Board case and not in another is hardly an "inconsistency." *Forum non conveniens*, after all, looks to the facts of each particular case; it would hardly be consistent with *that* doctrine for the court below either to transfer all Labor Board cases to other circuits or to transfer none. As was specifically pointed out to the court below by the Union when the same contention was made there by the Company, the petitioning union in *Butcher Boy* was not really an aggrieved party entitled to file a re-

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[8] See Opposition to Motion of Kohler Company to Transfer Proceedings; Opposition to Petition for Rehearing En Banc (Tr. 23-43; 75-78).

[9] Opposition to Motion of Kohler Company to Transfer Proceedings, pp. 13-19 (Tr. 35-41).

view proceeding in the District of Columbia Circuit or elsewhere, for all the relief sought by that Union before the Labor Board had been granted it. Apparently all nine judges below accepted this distinction of the cases. Judge Fahy, who participated in the *Butcher Boy* panel, likewise participated in the instant panel ruling; moreover, in the face of the Company's suggested "conflict" of rulings, all three members of the *Butcher Boy* panel participated without dissent in the denial of the motion for reconsideration in the instant case. Under these circumstances there is no possible "conflict" within the circuit below over which review could be granted.

(c) *Petitioner Has Made No Showing under Rule 20 that Imperative Public Importance Justifies Interlocutory Grant of the Writ*

As an applicant for certiorari before judgment in the court of appeals, petitioner must meet the requirement of this Court's Rule 20 for "a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Petitioner has made no such showing nor purported to do so, never even referring to the Rule.[10] The questions the Company seeks to raise here at an interlocutory stage would certainly be available to it in the event that the Court of Appeals should uphold and enforce the Labor Board's order in this case. Indeed, in a related situation four members of this Court recently pointed out in a dictum the inappropriateness of

[10] Actually, there is some question whether as a matter of jurisdiction this Court has authority to grant statutory certiorari before judgment in the Court of Appeals in a case coming from an administrative agency, where no judicial judgment has yet been rendered. See Robertson & Kirkham (Wolfson & Kurland edition), *Jurisdiction of the Supreme Court of the United States* § 132.

interlocutory review of a lower court's refusal to transfer a case to another jurisdiction. See *LaBuy* v. *Howes Leather Company*, 352 U.S. 249, 264-265, dissenting opinion of Justices Brennan, Frankfurter, Burton and Harlan.

In this case the Company has unconscionably stalled appellate review and enforcement of the Labor Board's Order against it, six months having already been used in the Court of Appeals to delay appellate review on the *forum non conviens* question. We are confident that this Court will not want to encourage the use of certiorari as an interlocutory device by which a party to administrative proceedings can delay enforcement on the mere claim that a court of appeals has abused its transfer discretion under 28 U.S.C. 2112(a). Under these circumstances, interlocutory certiorari review is totally lacking in "imperative public importance"; what is actually of imperative importance is the speedy and orderly disposition of review and enforcement proceedings in the Court of Appeals. Should that disposition be unfavorable to the Company in this case, the grounds it urges here will be available to it as grounds for requesting this Court's review after final judgment.

## Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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